IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 843

INVESTMENT COMPANY INSTITUTE, ET AL., *Petitioners*,

v.

WILLIAM B. CAMP, Comptroller of the Currency;
FIRST NATIONAL CITY BANK, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONERS' REPLY BRIEF

Nothing in the Briefs for Respondents in any way detracts from the unanimous conclusion of the Court of Appeals that "in cases of this consequence" there is a "need for judicial examination of the important questions raised" (per curiam opinion, Pet., p. 3a; minority concurring opinion, Pet., p. 4a; majority concurring opinion, Pet., pp. 37a, 49a).[1] Indeed,

---

[1] The Brief for the Comptroller of the Currency in Opposition will be referenced to herein as "Comp. Br." The Brief for Respondent First National Bank ("the Bank") will be referred to herein as "Bank Br." The Petition for Certiorari will be referred to as "Pet." and the Joint Appendix filed in the Court of Appeals as "J.A."

Chief Justice (then Judge) Burger set aside his doubts as to Petitioners' standing

> "in order to make a majority holding for review of the merits of a subject of such importance. I do so in order to reach consideration of the merits for such aid as some examination at our level may be useful to further judicial review." (Majority concurring opinion, Pet., p. 37a.)

There are only three points raised by Respondents to which a brief reply need be made.

First, contrary to Respondents' central assertion, this is clearly not a case challenging discretionary action of a federal official in which Petitioners are asking this Court to "substitute its judgment for administrative rulings upon matters within the expert competence of the regulatory agencies" (Bank Br., p. 10; Comp. Br., pp. 16, 17). Petitioners contend that the Comptroller has acted in direct violation of the Glass-Steagall Act and otherwise in excess of his statutory authority. In such a case, as we earlier pointed out (Pet., pp. 17-18), it is the responsibility of the courts to determine the lawfulness of the Comptroller's actions and the limits of his authority. This principle has been most recently reaffirmed by this Court in *The First National Bank* v. *Dickinson,* Nos. 19 and 34, October Term 1969, where the Court reversed the Comptroller's interpretation of a technical banking term ("branch") over the Comptroller's assertion that the definition was a matter of expert judgment committed to his discretion.[2] Likewise, on the only prior occasion in which the Glass-Steagall Act has been considered here, this Court, in an opinion by Mr. Justice Douglas, made its own determination of

---

[2] See Brief for the Comptroller of the Currency, Nos. 19 and 34, October Term, 1969, pp. 42-43.

the meaning of a technical term in the Act. See *Board of Governors* v. *Agnew*, 329 U.S. 441 (1947).[3]

Second, Respondents have not successfully challenged Petitioners' showing that certiorari should be granted to establish a definitive interpretation of the critical prohibitions of Glass-Steagall. Nothing in Respondents' Briefs casts any light on the construction of these prohibitions so as to dispel the ambiguity which has been created by the Court of Appeals' decision (see Pet., p. 15).[4] Petitioners have demonstrated (Pet., pp. 20-22) that "units of participation" issued by the Bank's Account are "securities" as that term is used in the Glass-Steagall Act. The Federal Reserve Board has concurred that such units are "'securities' under Section 32" of the Act, just as shares

---

[3] In any event, the memorandum of the Securities and Exchange Commission in the related action in No. 835, raises a serious question as to how definitive was the agency review upon which Respondents rely. This review admittedly did not reach a number of central Glass-Steagall questions. Moreover, the Commission has now stated that there "is no assurance that the Commission would reach the same judgment [exempting certain of the Bank's activities from the Investment Company Act] if a similar matter is again presented." Memorandum for the Securities and Exchange Commission, *National Association of Securities Dealers* v. *Securities and Exchange Commission*, No. 835, October Term, 1969, p. 4, n. 4. The Commission has acknowledged that "the major problem" in this dispute is "the consistency of the Account as constituted with the banking laws"; it has even conceded that if certiorari is granted here, it should also be granted in No. 835. *Id.*, at p. 4.

[4] Significantly, the Comptroller does not even attempt to define the term "security" as used in the Glass-Steagall Act. The Bank's attempt to limit it to "instruments of the type which are commonly sold in securities markets and in which the Bank might have an interest" (Bank Br., p. 12) would exclude instruments which everyone concedes are "securities" for Glass-Steagall purposes. Thus, shares in an ordinary mutual fund are not traded on securities markets; and, the distribution of shares in a no-load mutual fund yields no underwriting profit.

in mutual funds have always been so regarded.[5] The Comptroller's only response is to raise the strawman that Petitioners have asserted that the definition of "securities" in the Securities Act of 1933 must be "carried over" to the Glass-Steagall Act (Comp. Br., p. 14). His attempt to demolish that strawman is limited to pointing to legitimate banking instruments which are included within the broad definition of "security" in the Securities Act (Comp. Br., pp. 14-16). The fact is that Petitioners do not rely upon the Securities Act definition.[6] Furthermore, formal characteristics—that the units of participation are not transferable or that no printed certificates were to be issued under the initial form of the challenged regulations (Comp. Br., pp. 11-12)—do not detract from the conclusion the units are "securities"; indeed, these same characteristics can be found in garden-variety mutual funds.[7] By any standard, units of participation—representing pro rata shares in an investment medium which are offered and sold to the general public—are securities as that term is used in the Glass-Steagall Act. Thus, the Court is faced with important issues of statutory construction—issues which go to the breadth of the prohibitions of Glass-Steagall.

Third, although Respondents attempt to cast the entry by commercial banks into the mutual fund business as only an imperceptible extension of banks' tra-

---

[5] See Hearing on S. 2704 before a Subcommittee of the Senate Committee on Banking and Currency, 89th Cong., 2d Sess. (1966), pp. 583, 584.

[6] See Pet., p. 22, n. 29.

[7] Virtually no shares in mutual funds are traded from one investor to another, and there is no significant trading market for such shares. (J.A. 236-37) Also, as a matter of convenience, "a growing number of [mutual] funds provide a single open account arrangement for all investors . . . [and] [n]o stock certificates are issued to any shareholder unless specifically requested." Wiesenberger, Investment Companies 1969 (1969), p. 35.

ditional fiduciary activities, it is clear that this "new and free-wheeling form of fiduciary activity" (minority concurring opinion, Pet., p. 9a) cannot be squared with the prohibitions of the Glass-Steagall Act and does not constitute bona fide fiduciary activity under national banking laws. Respondents argue that a collective investment fund is merely a mingling of the accepted activity of managing individual investment accounts on the basis of giving particular attention to the personal and financial needs of each individual client, on the one hand, and the traditional bank role of supervising common trust funds for the economical investment of assets received by the bank in the capacity of "trustee, executor, administrator or guardian," on the other hand. Indeed, the Brief for the Comptroller suggests that banks have long been permitted to offer investment services to smaller investors through common trust funds (Comp. Br., p. 11). On the contrary, however, the Federal Reserve Board consistently rejected efforts of banks to transform bona fide common trust funds to a medium of general public investment, holding that trust powers

> "should not be used to enable a trust institution to operate a Common Trust Fund as an investment trust attracting money seeking investment alone and to embark upon what would be in effect the sale of participations in a Common Trust Fund to the public as investments." 26 Fed. Reserve Bull. 393 (1940).[8] (See Pet., p. 27.)

[8] Immediately prior to the transfer to the Comptroller of jurisdiction over trust activities of national banks, the Board was considering whether its common trust fund regulations should be tightened even further to exclude revocable inter vivos trusts so as to implement more effectively the prohibition against "the use of [common trust] funds as a medium attracting individuals primarily seeking investment management of their funds." 25 Fed. Reg. 12479 (1960).

What the Comptroller has authorized is no mere extension of traditional fiduciary activities. It is a "package deal offered to all comers" (minority concurring opinion, Pet., p. 10a); there is an "absence of an individually negotiated agreement" between the Bank and the beneficiary, the hallmark of bona fide fiduciary activity. (*Id.*, Pet., p. 9a.) However Respondents might wish to label these activities, there is nothing in Respondents' Briefs to detract from Petitioners' showing that the Glass-Steagall Act was intended by Congress to preclude banks from engaging in the very type of activity which the Comptroller's regulations would permit. (See Pet., pp. 27-31.) This Court should grant certiorari to ensure that the Congressional policies reflected in these basic regulatory statutes are not circumvented by administrative action.

* * *

For the reasons set forth in the Petition and in this Reply Brief, a writ of certiorari should issue.

Respectfully submitted,

G. DUANE VIETH
JAMES F. FITZPATRICK
1229 - 19th Street, N.W.
Washington, D. C. 20036
Attorneys for Petitioners

Of Counsel:
ROBERT L. AUGENBLICK
Investment Company Institute
61 Broadway
New York, New York 10006

ROBERT H. WINTER
DAVID J. NEWBURGER
ARNOLD & PORTER
1229 - 19th Street, N.W.
Washington, D. C. 20036

January 5, 1970